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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Deployment of Wireline Service Offering)
Advanced Telecommunications Capability)

CC Docket No. 98-147

COMMENTS
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

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Its Attorneys

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SUMMARY

TRA, a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, submits that the Commission cannot lawfully, and from a policy perspective, should not, relieve incumbent LECs of their statutory resale and network unbundling obligations as they relate to advanced telecommunications services. Not only would such action be in direct conflict with the text and the intent of the Telecommunications Act of 1996, but market forces are now driving the reasonable and timely deployment of advanced telecommunications capability, rendering such regulatory relief unnecessary. Worse yet, allowing incumbent LECs to avoid their Section 251(c)(3) and (4) network unbundling and resale obligations would hinder nascent local exchange competition and diminish existent long distance competition, impacting smaller providers most harshly.

If the Commission wishes to speed the broad and affordable availability of advanced telecommunications services, TRA submits that it should act to ensure the meaningful availability at wholesale rates for resale, and the ready access to the network components underlying the provision of, such services which Congress envisioned. To this end, the Commission should, as proposed in the *NPRM*, apply Section 251(c)(4) obligations to advanced services classified as exchange access services, and enhance the collocation opportunities and unbundled network access available to competitive LECs seeking to provide such services.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 98-188 ("*NPRM*") issued by the Commission in the captioned docket on August 6, 1998.

In the *NPRM*, the Commission proposes to sanction a means by which incumbent local exchange carriers ("LECs") purportedly may lawfully avoid their statutory resale and network unbundling obligations as applied to high-speed, switched, broadband telecommunications ("advanced telecommunications") services. Specifically, the Commission proposes to relieve incumbent LECs of their Section 251(c)(3) and (4) obligations to resell at wholesale rates, and to offer on an unbundled basis the network elements necessary to provide, advanced telecommunications services to the extent such services are provided by an affiliate of, rather than

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the majority of domestic providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

directly by the incumbent LEC.² In addition, the Commission proposes to provide limited relief from the Section 271 restrictions imposed on Bell Operating Company ("BOC") provision of advanced telecommunications services offered on an in-region, interLATA basis.³

Finally, in an effort to mitigate the adverse impacts of the regulatory relief the *NPRM* proposes to afford to incumbent LECs and preserve the ability of competitive LECs to provide advanced telecommunications services, the Commission has proposed to enhance both collocation opportunities and the availability of the network components of these services. To this same end, the *NPRM* also proposes to require the availability for resale at wholesale rates of advanced services used to provide exchange access services.

TRA submits that the Commission cannot lawfully, and from a public policy perspective, should not, relieve incumbent LECs of their statutory resale and network unbundling obligations as they relate to advanced telecommunications services. Not only would such action be in direct conflict with the text and the intent of the Telecommunications Act of 1996 ("Telecommunications Act"),⁴ but market forces are now driving the reasonable and timely deployment of advanced telecommunications capability, rendering such regulatory relief unnecessary. Worse yet, allowing incumbent LECs to avoid their Section 251(c)(3) and (4) network unbundling and resale obligations would hinder nascent local exchange competition and diminish existent long distance competition, impacting smaller providers most harshly.

² 47 U.S.C. §§ 251(c)(3), 251(c)(4).

³ 47 U.S.C. § 271.

⁴ Pub. L. No. 104-104, 110 Stat. 56 (1996).

If the Commission wishes to speed the broad and affordable availability of advanced telecommunications services, TRA submits that it should act to ensure the meaningful availability at wholesale rates for resale, and the ready access to the network components underlying the provision of, such services which Congress envisioned. To this end, the Commission should, as proposed in the *NPRM*, apply Section 251(c)(4) obligations to advanced services categorized as exchange access services, and enhance the collocation opportunities and unbundled network access available to competitive LECs seeking to provide such services.

I. The Commission Cannot Lawfully, and Should Not, Relieve Incumbent LECs of Their Statutory Resale and Network Unbundling Obligations

A. The Commission Cannot Lawfully Relieve Incumbent LECs of Their Statutory Resale and Network Unbundling Obligations

i. The Commission Cannot Do Indirectly What It is Prohibited From Doing Directly

Section 251 is the linchpin of the Telecommunications Act. Capsulizing the purpose of the Telecommunications Act, the Conference Report refers to the "opening [of] all telecommunications markets to competition" as the engine for "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."⁵ As recognized by the Commission, "the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications

⁵ S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) ("Conference Report")

markets."⁶ Section 251 is the mechanism provided by the Telecommunications Act for opening the local exchange and exchange access markets to competition, described by the Commission as one of two "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."⁷ As recently described by the Commission, "Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets."⁸

Confirming the central importance of Section 251, Congress predicated BOC entry into the in-region, interLATA market on the provision by a BOC of, among other things, (i) "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1);" (ii) "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1);" and (iii) the availability of telecommunications services "for resale in accordance with sections 251(c)(4) and 252(d)(3)."⁹ And perhaps most critically, Congress identified as one of only two limitations on the otherwise broad forbearance authority granted the Commission, a prohibition on Commission forbearance "from applying the requirements of section

⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 4 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted* 118 S.Ct. 879 (Jan. 26, 1998) (emphasis in original).

⁷ NPRM, FCC 98-188 at ¶ 73.

⁸ Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, 12 FCC Rcd. 6925, ¶ 41 (1997).

⁹ 47 U.S.C. § 271(c)(2)(B).

251(c) . . . until . . . those requirements have been fully implemented."¹⁰ In other words, in the view of Congress, the principle purpose of the Telecommunications Act will not be realized until Section 251(c) has been fully implemented. Or, as couched by the Commission:

The central importance of these provisions is reflected in the fact that they are the only two provisions that Congress carved out in limiting the Commission's otherwise broad forbearance authority under section 10.¹¹

The Commission has acknowledged that it lacks the authority under either Section 401 or 706 of the Telecommunications Act¹² to forbear from strictly applying Section 251(c), noting that "section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 'until it determines that those requirements have been fully implemented'" and that "[t]here is no language in section 10 which carves out an exclusion from this prohibition for actions taken pursuant to section 706."¹³ Indeed, the Commission recognized that "the conclusion that section 706 does not provide the statutory authority to forbear from sections 251(c) and 271" will "further Congress' objective of opening all telecommunications markets to competition, including the market for advanced telecommunications."¹⁴

¹⁰ 47 U.S.C. § 160(d).

¹¹ NPRM, FCC 98-188 at ¶ 73.

¹² 47 U.S.C. § 160(d); 47 U.S.C. § 157 (note); Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996).

¹³ NPRM, FCC 98-188 at ¶¶ 69 - 79.

¹⁴ Id. at ¶ 76.

It goes without saying that the Commission may not do indirectly that which it is prohibited by statute from doing directly.¹⁵ The Commission has recently been admonished by the U.S. Court of Appeals for the Eighth Circuit for violating this axiom. Thus, the Eighth Circuit faulted the Commission for seeking to exercise pricing authority through its Section 208 authority to hear complaints against common carriers¹⁶ and its Section 271 authority to review BOC applications for in-region, interLATA authority.¹⁷ even though, according to the Court, the Commission was barred from doing so by Section 2(b) of the Communications Act of 1934, as amended ("Communications Act").¹⁸ As described by the Court:

The FCC's attempt to continue to exercise pricing authority through section 271 is reminiscent of its earlier attempt to do so through section 208. We rejected that attempt in our prior decision. As we noted in our prior opinion, section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), as construed by the Supreme Court in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), fences off intrastate matters from FCC regulation. . . . We held in our prior decision, and we reiterate today, that no section or subsection of the Telecommunications Act allows the FCC to break through that fence. We reject not only its attempt to utilize section 271(d)(3)(A), but also its attempt to utilize section 271(d)(3)(C) to accomplish this purpose. *The FCC may not accomplish indirectly that which we have held it may not do directly.*¹⁹

¹⁵ See, e.g., *Continental Air Lines, Inc. v. CAB*, 522 F.2d 107, 115 - 16 (D.C. Cir. 1974).

¹⁶ *Iowa Util. Bd v. FCC*, 120 F.3d 753, 803 - 04 (8th Cir. 1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted* 118 S.Ct. 879 (Jan. 26, 1998)

¹⁷ *Iowa Util. Bd v. FCC*, 135 F.3d 535 (8th Cir. 1998).

¹⁸ 47 U.S.C. § 152(b).

¹⁹ *Iowa Util. Bd v. FCC*, 135 F.3d 535 at 541.

Here, the Commission is attempting to do precisely what Section 10(d) of the Communications Act does not permit it to do. It is proposing to relieve any incumbent LEC which elects to use an affiliate to provide such services of its Section 251(c)(4) resale and Section 251(c)(3) network unbundling obligations as they relate to advanced telecommunications services. Thus, having found that it lacks the statutory authority to forbear from enforcing these requirements under either Section 401 or 706 of the Telecommunications Act and having concluded that, even if it could so forbear, it would be a poor policy judgment to do so, the Commission proposes indirectly to allow incumbent LECs to avoid this "cornerstone[]" of the framework Congress established in the 1996 Act to open local markets to competition."²⁰ To use an old cliché, if it walks like a duck and quacks like a duck, it is a duck irrespective of what label is applied to it. Forbearance from applying and enforcing the mandate of Section 251(c), in whatever form such relief might take, is statutorily prohibited.

ii. **Relieving Incumbent LECs of Their Statutory Resale and Network Unbundling Obligations Conflicts with Two Foundational Principles of the Telecommunications Act**

Apart from the statutory prohibition against relieving incumbent LECs of their Section 251(c)(3) and (4) network unbundling and resale obligations as they relate to advanced telecommunications services, such an action would stand in clear conflict with two of the foundational principles of the Telecommunications Act. The first such principal is that resale should serve as a viable entry option for new entrants, particularly smaller providers, into the local market. The second principal violated by the proposed regulatory relief is the Congressional directive that

²⁰ NPRM, FCC 98-188 at ¶¶ 69 - 79.

there must be an incumbent LEC for every geographic location and service offering. Both principles would be eviscerated by the *NPRM* proposal.

As the Commission has repeatedly acknowledged, the Telecommunications Act "contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, *and resale*."²¹ The Commission has recognized that resale provides an interim entry vehicle for carriers that intend to deploy their own facilities, serves as a means for competitors to "reach customers in less densely populated areas," and, critically from TRA's perspective, constitutes "an important entry strategy . . . for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks."²²

The Commission, accordingly, readily acknowledged its obligation "to implement rules that eliminate statutory and regulatory barriers and remove economic impediments" to resale as well as the other two "coequal" entry strategies, committing to ensure that "all pro-competitive entry strategies may be explored."²³ Consistent with this commitment, the Commission ruled that "[g]iven the probability that restrictions and conditions may have anticompetitive results, . . . it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable."²⁴ As the Commission explained, "the ability of incumbent LECs to

²¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Red. 15499 at ¶ 12 (emphasis added).

²² Id. at ¶¶ 12, 32.

²³ Id. at ¶ 12.

²⁴ Id. at ¶ 939.

impose resale restrictions and conditions is likely to be evidence of market power."²⁵ The presumption so adopted, the Commission emphasized, was intended to "reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities."²⁶

The Commission, having committed to preserve resale as an entry vehicle particularly for smaller providers, now proposes to effectively abandon resale by relieving incumbent LECs of their obligation to make some of the most marketable services available at wholesale rate for resale. Access to a full array of service offerings is obviously critical to resale carriers active in the local telecommunications market. As the Commission has recognized, anything that "prevent[s] a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs" stands as a significant obstacle to competitive viability.²⁷ "[E]limination of these obstacles is essential," the Commission has acknowledged, "if there is to be a fair opportunity to compete in the local exchange and exchange access markets."²⁸

If resale carriers are denied the opportunity to acquire advanced services at wholesale rates for resale, they will be placed at a significant competitive disadvantage. A study recently submitted to the Commission by the United States Telephone Association (the "USTA Report") offers the "extremely conservative estimate" that "[b]y year-end 2001, . . . between 10 and 11% of

²⁵ Id.

²⁶ Id.

²⁷ Id. at ¶ 16.

²⁸ Id. at ¶ 18.

households" would subscribe to advanced telecommunications services."²⁹ Resale carriers would not only be unable to satisfy the advanced telecommunications needs of this high-end segment of the residential market (as well as its equivalent on the business side), thereby being deprived of a critical revenue opportunity, but would likely be walled off from this market segment altogether.

Given that advanced telecommunications services such as digital subscriber line ("xDSL") services provide both voice and data capability, an xDSL subscriber will have no need for POTS (plain old telephone service). As succinctly stated by the Commission, "[i]f ordinary citizens can access . . . ['highspeed, packet-switched'] networks at high speeds using existing copper wires, a variety of new services and vast improvements to existing services will be available."³⁰ In other words, a resale carrier offering only POTS would lose entire accounts, not just the data portions of such accounts, to carriers offering advanced telecommunications services for want of a comparable service offering. And this would apply not only to new accounts, but existing accounts, undermining not only what existing competitive progress has been made to date in the local market, but competition in the interexchange market as well. "Customer control" would be ceded to the carrier that could provide the customer with advanced telecommunications service, jeopardizing existing customer relationships in not only the local, but the long distance market.

To the extent that advanced telecommunications services render POTS obsolete for individual market segments, the universe of potential customers to which resale carriers that are

²⁹ Crandall, R. W., and Jackson, C. L., Eliminating Barriers to DSL Service, " p. 27 (July, 1998) (submitted as an *ex parte* filing in CC Docket Nos. 98-146 and 98-147 by letter filed by Lawrence E. Sarjeant, Vice President Regulatory Affairs & General Counsel, dated August 12, 1998). Messrs. Crandall and Jackson base their estimate on an assumed monthly rate of \$40 or less.

³⁰ NPRM, FCC 98-188 at ¶ 7.

denied the opportunity to acquire advanced telecommunications services at wholesale rates for resale will be able to effectively market their services will continue to shrink. Resale will become a less and less effective means of entry into the local market and non-facilities-based resale carriers will become much less of a competitive force in the interexchange market.

As noted above, the second foundational principal violated by the proposed regulatory relief is the Congressional directive that there must be an incumbent LEC for every geographic location and service offering. Implicit in the "three paths of entry into the local market" contemplated by Congress is that there would be in every geographic market and for every telecommunications service, an incumbent LEC through which to implement these strategies. Physical network interconnection cannot occur without an incumbent network with which to interconnect. Access to network elements cannot take place without an incumbent network to unbundle. And resale is a meaningless concept in the absence of retail services. Thus, Congress defined the term "incumbent local exchange carrier" to encompass not only all franchised wireline providers of local exchange service active on the date of enactment of the Telecommunications Act, but "successors and assigns" of such entities and any entity which occupies a "comparable" position in the market, and "substantially replaces," an incumbent LEC.³¹

The definition assigned to the term "incumbent local exchange carrier" reaches all existing franchised wireline LECs and any entity which assumes the mantle of the incumbent either with respect to a given geographic area or a specific service, assuring that there would always be retail services available at wholesale rates, network elements accessible on an unbundled basis and

³¹ 47 U.S.C. § 251(h).

physical networks with which to interconnect. Moreover, Congress ensured through Section 10(d) that such retail services, network elements and physical network interconnections would remain available to competitors until Section 251(c) had been fully implemented and the Commission could determine that such availability was no longer necessary to ensure that services were offered on just, reasonable and nondiscriminatory terms, to protect consumers, serve the public interest, and promote competitive market conditions.³²

Under the scheme espoused in the *NPRM*, there would be no incumbent LEC for advanced telecommunications services if an incumbent LEC elected to offer such services through an affiliate.³³ Accordingly, there would be no resale at wholesale rates of, and no access to the network elements necessary to provide, such services. The only means by which a competitive LEC could provide advanced telecommunications services under the *NPRM* scheme would be to acquire physical facilities and collocate them at individual central offices. In other words, with respect to advanced telecommunications services, Section 251(c)(4) would effectively be written out of the Telecommunications Act and Section 251(c)(3) would be rewritten to include a requirement that only entities which use some of their own facilities may provide advanced telecommunications services through use of unbundled network element. Of course, the Commission has held, and the

³² 47 U.S.C. § 160(d).

³³ Extrapolating from the *NPRM* proposal, one can envision a scenario in which an incumbent LEC allows an affiliate to undertake all new network construction, both within and at the geographic fringes of the existing network. The incumbent LEC would thereby create pockets in which retail services would be unavailable for resale at wholesale rates and network elements would not be accessible. New loop deployment in expanding suburban areas and new central offices could be placed outside the reach of Section 251(c) in this fashion. Congress did not envision a circumstance in which only portions of an incumbent's network was accessible by competitors, only a percentage of consumers would have a choice among alternative suppliers and only certain services would be made available for resale.

U.S. Court of Appeals for the Eighth Circuit has affirmed. that "Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled network elements to provide a telecommunications service."³⁴

iii. An Incumbent LEC Affiliate Which Provides Advanced Telecommunications Services Should be Treated as an Incumbent LEC to the Extent that the Incumbent LEC Does Not Provide These Services As Well

Section 251(h) provides that a "successor or assign" of a incumbent LEC will be deemed to be an incumbent LEC, as will an entity that "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent LEC]" and that "has substantially replaced [an incumbent LEC]."³⁵ TRA submits that in the event an affiliate of an incumbent LEC provides a local service offering not provided by the incumbent LEC, it should be deemed to be either a successor or assign of, or a provider comparable to, the incumbent LEC for purposes of Section 251(h). Such an approach is particularly critical when the services the affiliate is alone is offering provides an enhanced substitute for, and indeed, may ultimately render obsolete in given markets, the services the incumbent LEC offers.

³⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 328; Iowa Util. Bd v. FCC, 120 F.3d 753 at 814 - 15 ("Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements. To the contrary, this subsection imposes a duty on incumbent LECs to provide unbundled access "to any requesting telecommunications carrier for the provision of a telecommunications service." (emphasis in original))

³⁵ 47 U.S.C. § 251(h).

In its *Non-Accounting Safeguards Order*, the Commission declined to impose Section 251(c) obligations on an incumbent LEC affiliate simply because it provided local exchange services within the incumbent LEC's local service area or to bar an incumbent LEC from transferring "key local exchange and exchange access services and facilities" to an affiliate.³⁶ The Commission nonetheless recognized that such actions raised "legitimate concerns" regarding the potential "eva[sion of] . . . section . . . 251."³⁷ The Commission, accordingly, ruled that "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," it would be deemed to be "an 'assign' of the BOC under section 3(4) of the Act with respect to those network elements."³⁸ The Commission did not, however, limit the scope of the terms "successor" and "assign" to an incumbent LEC affiliate to which the incumbent LEC has transferred ownership of a network element.³⁹

In TRA's view, treatment of an incumbent LEC affiliate as a "successor or assign" of, or a carrier "comparable to," an incumbent LEC is appropriate when, to borrow a phrase coined by BellSouth Corporation, the affiliate "takes on an essential attribute of an ILEC."⁴⁰ An affiliate

³⁶ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 309 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *further recon. pending, remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* 12 FCC Rcd. 15756 (1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

³⁷ Id. at ¶ 309.

³⁸ Id.

³⁹ Id. at ¶ 305 ("Thus, if an affiliate provided local exchange service through its own facilities or by reselling the BOC's local exchange service, it would *not necessarily* be classified as an incumbent LEC." (emphasis added)).

⁴⁰ Comments of BellSouth (at 15) submitted in CC Docket No. 98-39 on May 4, 1998.

of an incumbent LEC which is the sole provider, among the incumbent LEC and its affiliates, of advanced telecommunications services has assumed the mantle of the incumbent as to these services. Thus, a customer desirous of acquiring advanced telecommunications services from the incumbent LEC would have no choice but to deal with the affiliate. The incumbent LEC would have effectively assigned to the affiliate its right to provide advanced telecommunications services and with respect to such services, the affiliate would occupy the position of the incumbent in the market, having replaced it as the incumbent provider of these services. Indeed, with respect to advanced telecommunications services, the incumbent LEC would have exited the market. Moreover, given that the advanced telecommunications services will substitute for, and ultimately render obsolete, the traditional services the incumbent LEC will continue to offer, the incumbent LEC has essentially ceded to the affiliate its position in the market of the future.

Like the Commission, incumbent LECs should not be permitted to do indirectly that which they are forbidden by law to do directly. An incumbent LEC which declines through an affiliate to make a service available at wholesale rates for resale is restricting resale no less effectively than if it had directly refused to offer the service at wholesale. The Commission has recognized that if incumbent LECs were allowed to "avoid . . . [their] statutory resale obligation by shifting . . . customers to . . . [contract service arrangements ("CSA")]" and then "foreclosing resale of CSAs," local exchange competition would be hindered.⁴¹ The Commission has further recognized, as noted above, that the ability of a carrier to refuse to provide resale opportunities is

⁴¹ Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶224 (1997), *recon. pending, appeal pending sub. nom. BellSouth Corporation v. FCC*, No. 98-1019 (D.C.Cir. Jan. 3, 1998)

indicative of market power.⁴² The Commission should not sanction here the use of a transparent means of avoiding resale. To the extent an affiliate of an incumbent LEC alone, rather than in addition to the incumbent LEC, provides advanced telecommunications services, it should be treated as an incumbent and required to make those services and their underlying network components available to competitors pursuant to Section 251(c)(3) and 251(c)(4).

B. The Commission Should Not Relieve Incumbent LECs of Their Statutory Resale and Network Unbundling Obligations

As TRA explained in its comments submitted in response to the Commission's *Notice of Inquiry*, FCC 98-187, exploring in CC Docket No. 98-146 the reasonableness and timeliness of the deployment of advanced telecommunications capability, market forces are now driving the deployment of such capability and should ensure that the deployment continues in a reasonable and timely fashion. The Commission, accordingly, need not, and should not, take any action to speed the deployment of advanced telecommunications other than to clearly indicate that further deployment delays by the incumbent LECs will not be rewarded with relief from the resale and network unbundling requirements of Section 251(c). Not only is such relief unnecessary to prompt continued deployment of advanced telecommunications services, but it would serve to slow the affordable availability of advanced telecommunications services by effectively eliminating resale providers as an alternative source of such services for consumers who are overlooked or ignored by the incumbent LECs.

⁴² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Red. 15499 at ¶ 939.

Admittedly, deployment to date of advanced telecommunications capability has been slow, primarily due to a lack of competitive pressure on incumbent LECs. Thus, for example, incumbent LECs were notoriously slow in bringing Integrated Services Digital Network ("ISDN") services to market. Until recently, deployment of such services was geographically and demographically limited. Incumbent LECs, however, have come to realize the value of ISDN in generating incremental revenues and enhancing customer retention. For example, incumbent LECs have begun using ISDN to provide them with a competitive edge in entering the Internet services market and competing therein against Internet service providers ("ISPs"). To this end, incumbent LECs are offering Internet access over ISDN lines for the price of a dedicated ISDN line alone.⁴³ It is not surprising then that the number of ISDN-capable switching offices has increased by over 100 percent over the last five years, and that ISDN-capable offices now serve over 70 percent of access lines.⁴⁴

Incumbent LECs have followed a like path with respect to xDSL services. The technologies underlying xDSL service have been available now for three decades, yet the broad deployment of these services is only now beginning, driven by newly emerging market forces. As described by one analyst:

⁴³ "Bell Atlantic to Offer High-Speed Links to Net," Washington Post, Section. E, p. 3 (June 4, 1998); "Bell Atlantic Waives Set-Up Fees for ISDN Internet," ISDN News (June 16, 1998).

⁴⁴ Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service, pp. 88 - 90 (July, 1998).

After their long sleep, the RBOCs are waking up to the value of digital subscriber line (DSL) technology just as the cable industry has begun rollouts of their high-speed modems.⁴⁵

There are currently 20 times the number of subscribers to cable modem service – "high-speed data, interactive computer and other Internet-based services offered by cable operators"⁴⁶ – as there are subscribers to xDSL services in the United States.⁴⁷ It is estimated that there will be 20 to 30 million cable modem service subscribers by the end of the century.⁴⁸ "The cable industry is in the midst of a transformation from self-contained, coaxial distribution systems that feature one-way delivery of analog television signals to two-way, interactive broadband systems involving a hybrid of traditional coaxial and modern fiber optic technologies."⁴⁹ These new hybrid fiber-coaxial networks "enable the industry to deliver a wide range of telecommunications and information services – including Internet access, telephony, and digital television."⁵⁰

The threat posed by the cable industry is obviously enhanced by AT&T Corp.'s ("AT&T") pending merger with Tele-Communications, Inc. ("TCI"). Once completed, the AT&T/TCI merger will provide AT&T with broadband access into roughly one-third of American homes, allowing it to provide a full spectrum of services without use of incumbent LEC loop

⁴⁵ Sanford C. Bernstein & Co. Inc., Industry Report, pp. 1 - 2 (March 20, 1998). The incumbent LECs were also protecting existent revenue streams such as revenues from T-1 facilities.

⁴⁶ Esbin, Beth, Internet Over Cable: Defining the Future in Terms of the Past, p. 77 (August, 1998).

⁴⁷ Merrill Lynch Capital Markets, Industry Report, pp. 3 (June 22, 1998).

⁴⁸ Id.

⁴⁹ Esbin, Beth, Internet Over Cable: Defining the Future in Terms of the Past at p. 75.

⁵⁰ Id.

facilities.⁵¹ The competitive implications for incumbent LECs of the combination of the largest interexchange carrier and the largest cable television ("CATV") service provider are manifest. As described by AT&T, "AT&T Consumer Services will own and operate the nation's most extensive, broadband local network platform," providing thereby "the broadest set of consumer communications services - including local, long distance, wireless and international communications, cable television, dial-up and high-speed Internet access services - all under the AT&T brand name."⁵²

Responding to market forces, incumbent LECs have accelerated their deployment of advanced telecommunications capability. The Commission has recently reported that the BOCs have now installed nearly a quarter of a million of the "bandwidth enhancing terminals" necessary to provide xDSL service.⁵³ Moreover, the BOCs have joined with a number of other industry participants, including the likes of Microsoft Corp., Intel Corp., Compaq Computer Corp., as well as most DSL hardware vendors, to form a Universal ADSL Working Group ("UAWG") to develop a "splinterless" Asymmetric Digital Subscriber Line ("ADSL") technology -- i.e., "G.lite" - which would be more forgiving of current infrastructure, have a longer reach than higher-speed DSL technologies, and be less expensive to deploy given that it would not require installation of a unit

⁵¹ "AT&T Engineers Defend Cable Telephony," Communications Today (July 2, 1998); "MIN Media Scoreboard Overview: Will it be Deja Vu All Over Again for Newlywed TCI," Media Industry Newsletter (June 29, 1998).

⁵² AT&T News Release, "AT&T, TCI to merge, create new AT&T consumer services unit" (June 24, 1998).

⁵³ Kraushaar, J. M., Fiber Deployment Update End of Year 1997, pp. 20 - 21 (July, 1998).

to split voice and data communications at the customer location.⁵⁴ A potential G.lite standard is expected to emerge in 1999 as a result.

US WEST Communications, Inc. ("US WEST") has already deployed Asymmetric Digital Subscriber Line ("ADSL") service on a mass-market basis in hundreds of central offices in 40 cities throughout its region, touting the ability of ADSL service to "let[] customers transmit both data and voice calls over turbo charged existing phone lines, and . . . its . . . affordable high-speed bandwidth and 'plug-and-play' ease of use."⁵⁵ GTE Corp. ("GTE") has announced that it will deploy xDSL capability and roll-out associated services -- *i.e.*, ADSL and symmetrical digital subscriber line ("SDSL") services -- in 300 central offices in 16 states, completing the final phase of the deployment by the end of 1998.⁵⁶ Indeed, GTE has identified as a key corporate objective the "offer[ing] of a broad array of services, with increased focus on enhanced data and leading-edge Internet services."⁵⁷

Bell Atlantic is trialing ADSL and has begun to deploy the service in selected areas, with the stated intention of making ADSL available on seven million telephone lines by the end of

⁵⁴ "Incompatibility Woes Drive DSL Compromise," Network World (March 16, 1998).

⁵⁵ News Release, US WEST to Launch Second 20-City Wave of Lightning-Fast ADSL Internet Service; Will Complete Deployment on Always-on 'Web-tone' to Homes and Businesses in 40 Cities by July (June 5, 1998).

⁵⁶ "GTE Decides Time is Right for Large-Scale ADSL Roll Out," ISDN News, Vol. 11, No. 8 (April 21, 1998).

⁵⁷ GTE Annual Report 1997, Chairman's Message, p. 1.

1999⁵⁸ and 10 to 15 million by 2002.⁵⁹ Like GTE, Bell Atlantic has identified as a strategic priority to "accelerate growth and penetration in the data communications market."⁶⁰ Indeed, one industry observer noted that "[t]he merger of GTE . . . and Bell Atlantic . . . is more about data than long-distance."⁶¹ SBC Communications Inc. ("SBC") is deploying ADSL capability in 87 central offices in 200 localities in California.⁶² And as described by SBC in its 1997 Annual Report, it "launched FasTrak DSL, based on Asymmetric Digital Subscriber Line technology (ADSL), in a limited number of cities, and . . . expect[s] a broader launch in 1998."⁶³

BellSouth Corporation ("BellSouth") has announced its intention to roll-out ADSL in 30 markets through 1999.⁶⁴ Commercial deployment will commence on a limited basis in 1998 and with a broader roll-out in 1999, with the stated intent of offering ADSL service as a "mass

⁵⁸ "Broadband Data Propels GTE/Bell Atlantic Merger," Broadband Networking News, Vol. 8, No. 16 August 4, 1998); "Bell Atlantic Jumps into ADSL Market with 3 Offers for Home Users," Communications Daily (June 4, 1998).

⁵⁹ Raymond James & Associates, Inc., Industry Report, p. 1 (March 2, 1998).

⁶⁰ Id. at p. 1.

⁶¹ "Broadband Data Propels GTE/Bell Atlantic Merger," Broadband Networking News, Vol. 8, No. 16 (August 4, 1998).

⁶² "Telecoms: SBC to Roll Out Californian ADSL Services in July," IAC (SM) Newsletter Database (TM) APT Data Services Ltd. (UK) Network Briefing (May 29, 1998).

⁶³ SBC Communications Inc. 1997 Annual Report, "In 1997, our solid growth confirms that SBC is investing in and developing the right business," "Data Strength: SBC balances the need to grow existing services with the desire to be among the first-to-market with new products."

⁶⁴ "BellSouth to Sell ADSL Service in 30 Markets by End of 1999," ISDN News (June 2, 1998).

market service."⁶⁵ Indeed, BellSouth Finally, Ameritech Corporation ("Ameritech") is also positioning ADSL as a mass-market offering, projecting the commercial availability of ADSL to seven out of ten of its customers by year-end 2000.⁶⁶ According to Ameritech, ADSL and other data services represent the "significant untapped growth potential in . . . [its] core business."⁶⁷

GTE estimates that "industry-wide data revenues are expected to quadruple from roughly \$100 million in 1997 to over \$400 billion in 2006."⁶⁸ A market of this magnitude obviously cannot be ignored by the incumbent LECs. Moreover, the issue is not merely which industry segment will secure the lion's share of data revenues, but which industry segment will win the battle for customer control. As couched by one industry observer, "[s]ince cable modems are rolling, and, unopposed, will ultimately offer not only high-speed data but voice telephony as well (both Internet voice and circuit switched), the BOCs are certainly damned if they don't deploy xDSL."⁶⁹

⁶⁵ Deutsche Morgan Grenfell Inc., "Last Mile/Wireline Telecommunications Equipment," Industry Report, p. 2 (June 10, 1998); Raymond James & Associates, Inc., Industry Report at 4: "BellSouth to Sell ADSL Service in 30 Markets by End of 1999." ISDN News (June 2, 1998).

⁶⁶ Raymond James & Associates, Inc., Industry Report at 3; "Ameritech Interactive Aims to be One-Stop Shop," Communications Today (May 27, 1998).

⁶⁷ Ameritech 1997 Annual Report, "Chairman's Letter," p. 2 (Jan. 31, 1998).

⁶⁸ GTE Annual Report 1997, "Chairman's Message," p. 3.

⁶⁹ Sanford C. Bernstein & Co. Inc., Industry Report, at p. 3; "Ameritech Interactive Aims to be One-Stop Shop," Communications Today (May 27, 1998) ("Still ['Kate Delhagen, an analyst with Forrester Research'] warns that ADSL and ISDN Solutions are 'two years behind the cable guys . . . The phone line solutions must beat cable access to the neighborhoods and come in with a better price. And with the BOCs, she warns, capability is less a concern than actual execution.'").